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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, APPELLANT,

versus

THE UNITED STATES, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, - - - - - *Appellant,*

versus

THE UNITED STATES, - - - - - - - - *Appellee.*

BRIEF FOR APPELLANT.

Appeal from the District Court of the United States for the Western District of Kentucky.

STATEMENT OF THE CASE.

Appellant is the owner of a bridge across the Ohio River at Louisville, Ky., known (*and hereinafter referred to*) as the "Ohio Falls" bridge, which was built under the provisions of an Act of Congress entitled, "An Act to establish certain post roads," approved July 14, 1862, as supplemented by an Amendatory Act of Congress approved February 17, 1865.

The 1865 Amendment* in terms referred to the bridge here in controversy over the Ohio River at the head of the falls at Louisville.

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*These Acts are printed in full in the appendix to this brief following page 70.

The 1862 Act as amended allowed the bridge to be built under one of three plans detailed in the acts. The plans set forth a minimum width for channel spans and a minimum clearance height above low water.

The 1862 Act then provided:

> "That any bridge or bridges erected under the provisions of this Act shall be **lawful structures,**† and shall be recognized and **known as post routes,** upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services; and **the officers and crews of all vessels, boats or rafts, navigating the said Ohio River, are required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this act.**"

The 1865 Amendment said:

> "That the bridge erected under the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route."

Neither the 1862 Act nor the 1865 Amendment contained any reservation to Congress of the right to alter or amend the terms of the grant, nor any reservation of control of the property placed in the river pursuant to the terms of the acts, nor any limitation upon the extent, in time, of the grant.

The Ohio Falls bridge was built in all respects in accordance with the requirements of the Act of 1862 ex-

†Black throughout ours.

cept that instead of the builders holding to the minimum of a 300-foot channel span as the Act allowed, they built channel spans of 380 feet and 352¼ feet respectively, and exceeded the clearance height of the highest of the three authorized plans.

The bridge was completed in 1870, and in 1871, a Board of Engineers appointed at the direction of Congress, made a critical examination of Ohio River bridges, and in summing up their findings for report to Congress with reference to the Ohio Falls bridge, said:

> "The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and width that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."
>
> (*See Public Documents, 42d Congress, Senate Ex. Doc. No. 1.*)

From the time of its completion, the Ohio Falls bridge has been continuously used as a railroad bridge, and is one of the main thoroughfares across the Ohio River from the north to the south, and under the direct action of Congress, was declared a lawful structure and post road.

About August 20, 1914, the Secretary of War, acting under Section 18 of an Act of Congress of March 3, 1899, which section reads as follows:

> "Sec. 18. Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such

persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts (*or from the existing circuit courts*) direct to the Supreme Court either by the United States or by the defendants,"

gave appellant notice that he had good reason to believe the Ohio Falls bridge was an obstruction to navigation on account of the fact that the channel span was not 600 feet wide, and because there was not a vertical lift span of 200 feet in width over the Louisville and Portland canal, and set October 14, 1914, as the time for a public hearing on this question.

Appellant introduced no evidence at this hearing, but filed a protest against any action by the Secretary under the Act of 1899 on the ground that this Act did not affect bridges built under the Act of 1862, or, if it attempted to, that it was unconstitutional.

After the hearing the Secretary issued the following order:

"WAR DEPARTMENT.

"Washington, D. C., December 12, 1914.

"To Charles H. Gibson,
President, Louisville Bridge Company,
906 Realty Building, Louisville, Ky.

"Take notice that—

"Whereas, the Secretary of War has good reason to believe that the bridge of the Louisville Bridge

Company across the Ohio River at Louisville, Kentucky (*commonly known as the 'Ohio Falls' bridge*) is an unreasonable obstruction to the free navigation of the said Ohio River (*which is one of the navigable waterways of the United States*) on account of (*1*) insufficient horizontal clearance of the channel span crossing the main navigable channel known as 'Indiana chute,' and (*2*) insufficient width of opening in the existing swing span crossing the Louisville and Portland canal;

"And whereas the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through or under it reasonably free, easy and unobstructed, to-wit:

"(*1*) That the span of said bridge crossing 'Indiana chute' be so changed as to provide a horizontal opening 600 feet wide in the clear.

"(*2*) That the existing swing span of said bridge across the Louisville and Portland canal be changed to a lift span giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

"And whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above.

"Now, therefore, in obedience to, and by virtue of, Section Eighteen of an Act of the Congress of the United States, entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof.

LINDLEY M. GARRISON,
Secretary of War."

Some time after this order was issued, another hearing was had before the Secretary in person, after which hearing, the following letter was written denying the legal right of the Secretary in the premises:

"LOUISVILLE BRIDGE COMPANY.
President's Office.

Louisville, November 26, 1915.

"To the Secretary of War,
Washington, D. C.

"*In re* Reconstruction of Superstructure of Louisville Bridge.

"Sir:

"Referring to the correspondence and conferences heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

"1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that when completed, it will not interfere with navigation any more than it does now.

"2nd. The company intends to at once commence and continue the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

"If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

C. H. GIBSON,
President."

Thereafter, the Attorney General filed the present bill of complaint setting forth in substance the foregoing facts, and seeking to enjoin appellant from renewing the

superstructure of its bridge upon the existing piers, or renewing it in such a manner as not to leave a 600-foot channel span as was directed in the order of the Secretary of War of December 12, 1914, or from doing any of the matters or things which it threatened to do in its letter of November 26, 1915.

To comply with the order of the Secretary of War of December 12, 1914, involves the destruction of property of appellant and its replacement with other property at an increased cost of over $400,000.

The bill of complaint did not allege that any provision had been made by Congress to pay for the property of appellant which a compliance with the Secretary's order would destroy, or contain any proffer to secure appellant "just compensation," in accordance with the provisions of the Fifth Amendment to the Constitution, for its property which was to be taken under the order of the Secretary.

The District Court tried the cause on the complaint, answer, and a stipulation of facts (*see Record, pages 9, 10, 11*) and entered a decree granting the prayer of the complaint.

A direct appeal to this court is given by the terms of the 1899 Act and the cause is now here for review.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors, set forth on pages 25 and 26 of the record, may be summarized thus:

1. The decree holds that Congress may not, by an express grant, allow the placing in a navigable

stream of property, the ownership of which is thereafter protected by the Fifth Amendment to the Constitution.

2. It holds that property declared under Congressional Act to be lawfully where it is, can not be considered as taken within the intent of the Fifth Amendment unless title thereto is transferred to the United States.

3. It holds that the Secretary of War has authority, under the Act of March 3, 1899, to order the destruction of property in a navigable stream which has been placed where it is under an express Congressional Act.

4. It sustains the action of the Secretary of War under Section 18 of the Act of 1899 ordering the destruction of a lawful structure without requiring compensation for the property thus taken for public use as provided for in the Fifth Amendment.

5. It authorizes the taking of a lawful structure for public use when the complaint and the proof fail to show any intention upon the part of the United States to render just compensation for the private property thus taken.

6. It holds that the Act of 1899 applies to bridges built under the Act of 1862.

ARGUMENT.

Stipulation IX (*Record, page 11*), is as follows:

"It is expressly agreed, and here stipulated, between complainant and respondent, that the sole question to be determined in this case is the legality

of the order of the Secretary of War as applied to the bridge of the respondent."

The decree below was entered upon the theory that the order of the Secretary of War of December 12, 1914, automatically changed the Ohio Falls bridge from a "lawful" to an "unlawful" structure; that the order of the Secretary was, in effect, the withdrawal by Congress of its assent to the continuance of the bridge legalized by the Act of 1862 as amended by the Act of 1865; and that appellant was not entitled, under the Fifth Amendment, to just compensation for the property thus destroyed, although the Act of Congress under which the bridge was built reserved no right of amendment or repeal.

THE POWER OF CONGRESS TO REGULATE COMMERCE IS SUBJECT TO THE LIMITATION OF THE FIFTH AMENDMENT.

That the control of Congress over navigable waters of the United States is derived solely from the power to "regulate commerce with foreign nations and among the several States and with Indian tribes," seems to be well settled.

In **Bridge Company v. United States**, 105 U. S. at page 475, Chief Justice Waite said:

> "The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States."

In his strong dissent in the same case, Mr. Justice Field also said, at page 489:

> "Its (*Congress'*) power to authorize the construction of such bridges not being conferred in express terms by the Constitution, must, if it exist, be deduced from the power to regulate commerce with foreign nations and among the several States."

In none of the many opinions of this court touching the right of Congress to legislate with reference to bridges is there a suggestion that the power is derived from any other source.

Co-extensive with the power given to Congress to "regulate commerce" is the power given by the same section and article of the Constitution "To establish post offices and post roads." Both are subject to the limitation of the Fifth Amendment, which provides that—

> "Private property shall not be taken for public use without just compensation."

Clearly, this amendment is as applicable to action under the power to regulate commerce as to action under the power of eminent domain when that power is used to take property for the establishment of a post office or post road.

To say that "uncompensated obedience" must be given by the citizens when Congress desires to regulate commerce for the general benefit, even though the effect of so doing requires the surrender of property lawfully his own, and at the same time to admit that "uncompensated obedience" does not require the surrender of his property when a post office is to be established, is inconsistent. The result in the first case is exactly the same to the owner of the property as in the second. Unless

paid for his property, he is deprived of it without just compensation.

Speaking of the power of eminent domain, in **United States v. Jones**, 109 U. S. at page 518, the court said:

> "It is an incident of sovereignty, and, as said in Boom v. Patterson, 98 U. S. 403, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a **condition upon which the power may be exercised.**"

In a note on page 213, Vol. 1, 4th Edition of **Story on the Constitution**, it is said:

> "The Constitution was accepted and put in force in anticipation of, and in reliance upon, the adoption of these amendments, and by them the instrument was completed."

In the **Monongahela Navigation Co. case**, 148 U. S., at page 336, there is a clear statement of this limitation on the exercise of the commerce power:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment and can take only on payment of just compensation."

In view of the full recognition by the repeated decisions of this court that in regulating commerce, while the power of Congress is **supreme**, it is not **plenary**, but subject to the limitation of the Fifth Amendment, the sole question at bar is whether there is a **taking** or **destruction** of private property for public purposes. The answer is found in the history of the location of the property, which the United States, through its Secretary of War, seeks to destroy.

THE OHIO FALLS BRIDGE WAS CONSTRUCTED UNDER AN IRREVOCABLE FRANCHISE.

When the Act of February 17, 1862, and the supplement of February 17, 1865, were passed, the Civil War was in progress, and the great need of a bridge west of the Big Sandy that would form post roads for the transfer of troops and supplies from the north to the south still urgent. There were no bridges crossing the Ohio River at either of the great cities of Cincinnati or Louisville, or at any point west of these cities, and it is a matter of historical knowledge that their absence so hampered the movement of troops and supplies during the war, that at one time a pontoon bridge at Louisville became an absolute necessity. The river at Louisville is approximately a mile wide, and the current quite rapid on account of the falls, and in winter, the river is frequently filled with heavy ice; so the importance of a sure means of crossing the river at all times was a pressing necessity. This need only be filled by a bridge. The war had exhausted the country financially, and capital for

large undertakings, such as the building of a large bridge, was exceedingly difficult to secure. Nothing short of favorable franchise grants could induce this character of investment.

Under these conditions, Congress passed the Act of 1862 and the Amendment of 1865.

Section 3 of the Act of 1862 provided:

> "And be it further enacted, That it shall be lawful for any other railroad company or companies, whose line or lines of road may now or shall hereafter be built to the Ohio River, above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided."

Section 4 contained provisions intended to prevent the authorized structure from being an obstruction to navigation, and specified in detail the length and height of spans required.

Section 5 was as follows:

> "And be it further enacted, That any bridge or bridges erected under the provisions of this act shall be **lawful structures**, and shall be recognized and **known as post routes**, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services; **and the officers and crews of all vessels, boats or rafts, navigating the said Ohio River are required to regulate the use of the said**

> **vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this act."**

The Act of 1865 authorized the "stockholders of the Louisville Bridge Company" to build a bridge across the Ohio at the head of the falls at Louisville. Section 2 declared:

> "And be it further enacted, That the bridge erected under the provisions of this act shall be a **lawful structure, and shall be recognized and known as a post route."**

By these acts Congress exercised both powers heretofore referred to,

1. It directly regulated commerce;
2. It established a post road.

Neither the original nor supplemental Act contained any reservation of the right to **alter** or **amend.** Neither Act contained any suggestion that the builders of the bridge placed their private property beyond the protection of the Fifth Amendment in placing it in the river pursuant to the acts; and yet it is argued, and the District Court held, that this must have been understood, because (*as the opinion states*) one Congress can not, by its action "fetter" a subsequent Congress in the exercise of its right to regulate commerce. The opinion (*Record, page 21*), says:

> "If this power (*i. e., the unfettered exercise by each succeeding Congress of the right to regulate commerce*) does not exist almost without limitation, we have read in vain rulings like those in Louisville

& Nashville Railroad Co. v. Mottley, 219 U. S., page 408."

Such a position denies to Congress the very power claimed by appellee to be in Congress. If Congress can not make contracts which a subsequent session may not repudiate, it is indeed impotent. If it can not pass any Act, even in express terms making a contract for say five, ten, or twenty-five years, and giving security to structures built upon the faith of that Act, Congress is, in reality, denied the right to either regulate commerce or establish post roads. On the other hand, if its right to make a contract for a given period, in express terms be admitted, then the statement in the opinion below as the foundation for the ruling is swept away, for a legal contract for ten years would fetter succeeding sessions. The solution of supposed difficulties is not hard, and the rights of all are protected if we give to the powers of Congress and the limitations on those powers a natural construction, viz., concede to each session of Congress the power to establish and regulate, but require compensation wherever private property lawfully placed under sanction of a preceding session of Congress is taken or destroyed.

The effect of the grant of a private franchise, upon the faith of which property was invested, which reserved no right to alter or amend, was settled in the Dartmouth College case (*4 Wheat. 518*), in which Mr. Justice Story said:

> "When a private eleemosynary corporation is thus created by the charter of the crown, it is subject

> to no other control on the part of the crown than what is expressly or implicitly reversed by the charter itself. **Unless a power be reserved for this purpose, the crown can not in virtue of its prerogative without the consent of the corporation**, alter or amend the charter or divest the corporation of any of its franchises," etc.

In the late case of **Owensboro v. Cumberland Telephone Co.**, 230 U. S., at page 65, Mr. Justice Lurton said:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business is a grant of a property right **in perpetuity** unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the State or by the corporate powers of the city making the grant."

When, with the knowledge that this court had consistently held that in the absence of the reserved power in the act itself, the franchise enacted would be **in perpetuity**, Congress passed the Act of 1862 and supplemented it by the Amendment of 1865, and in neither reserved any right to alter or amend the grant, can it be doubted that Congress understood that its grant would be construed to be a permanent one, and that it intended that the lawful structure which the grant contemplated could thereafter only be removed in the exercise of its sovereign power of eminent domain? The very terms of both acts suggest that Congress fully appreciated the permanency of the grant. The title, itself, suggests this: "To establish certain post roads"; and in each Act, it is

declared the bridges, when so built, shall be "lawful structures" and "known as post routes." Why "lawful structures" if immediately upon the completion of one of them, the next session of Congress can, by withdrawing assent to its continuance, require its destruction without compensation? Why "lawful structures" if they are beyond the protection of the Fifth Amendment whenever the granting power chooses again to act?

The direct contrary is shown by the construction given the words "lawful structures" by this court. In the case of **Gray v. Chicago, etc., Railroad Co.**, 10 Wallace, 454, where an Act of Congress declaring the Clinton bridge to be a lawful structure was under consideration, Mr. Justice Nelson said:

> "We can not doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared 'a lawful structure,' that is, the bridge as built with its abutments, piers, superstructure, draw and height, should have the sanction of the law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section."

The 1866 Act involved in the above case expressly reserved the power to amend.

Then the 1862 Act also says they shall be "known as post routes" and requires the charges for transportation of troops to be the same as on the remainder of the line, and further shows the intention of Congress to subordinate water commerce to land commerce in so far as

the bridge built under the authority granted may obstruct the former, by requiring boats not to "interfere with the elevation, construction or use of the authorized bridge."

A full recognition of the principle contended for is found in the decision of this court in **Monongahela Navigation Company v. United States**, 148 U. S. 312.

The contention in that case arose out of the following facts: In 1881 Congress passed an Act, under its power to regulate commerce, for the purpose of improving the upper Monongahela and appropriated $25,000 for that purpose. The Act contained this provision:

> "But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken, in good faith, the building of lock and dam number seven at Jacobs Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

The Navigation Company had theretofore, under authority of Pennsylvania, but without authority of, or action by Congress, built locks and dams in the Monongahela River, and secured from Pennsylvania a franchise for charging tolls in the locks so constructed. Lock and dam number seven was completed in 1884 by the Navigation Company. In 1888 Congress directed the Secretary of War to buy the locks and dams, or failing in this, to condemn them, but directed that no payment should be made for the franchise to collect tolls. This Act was pursuant to its power to "regulate commerce." In the condemnation proceedings which followed, the company

challenged the constitutionality of the right of Congress to deny it compensation for its franchise.

In upholding the claim of the company, this court, after conceding paramount authority in all cases, to Congress, to act with reference to navigable rivers, and plenary authority where the obstruction had been placed without congressional warrant, after quoting the above provision regarding expenditure of the $25,000 appropriation, said, at page 335:

> "This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company.
>
> "Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce."

Again, at page 336:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted."

The Government in that case urged the same argument it presses here, viz., that

> "it is incompetent for a Legislature to barter away or conclude itself in the exercise of any constitu-

tional grant of legislative power." (*See Argument, Attorney General, 148 U. S., page 323*) and meeting it, Mr. Justice Brewer said:

"It is evident, therefore, that the point decided (*in Bridge Co. v. United States, 105 U. S. 470*), was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation and with the knowledge that Congress might, at any time, declare that the bridge constructed as proposed was an obstruction to navigation and that Congress, exercising this reserved power, did not thereby subject the Government to any liability for damages."

Again:

"In the case at bar, there is no such reservation," etc.

And:

"But here, there was a chartered right created—the right not merely to improve the river, but to exact tolls for the use of the improvement—and such right created by an act of incorporation as long ago settled in this court in Dartmouth College Trustees v. Woodward, 4 Wheat. 518, is a contract which can not be set aside by either party to it."

Can the grant be less effective if made by Congress direct, without a reservation, than if made by the State, and merely impliedly assented to by the congressional invitation?

Construed, then, in the light of the law as it existed when the grant was made, in the light of the objects of

the enactment, in the light of the natural and harmonious reconciliation of the power to regulate commerce and to establish post roads, and the limitation of the Fifth Amendment, the Act of 1862 as amended clearly placed the private property of the Bridge Company beyond the power of any future session of Congress to destroy in the interest of the public or for the public use without making just compensation.

When the Bridge Company built its bridge in full compliance with the Act, a lasting contract was constituted between the company and the United States which gave the company property rights in the bridge as so constructed, located and maintained, which could only be taken or destroyed in the exercise of the sovereign power of eminent domain to further commerce for public use.

IS THERE A TAKING OF THE PRIVATE PROPERTY OF THE BRIDGE COMPANY?

We have heretofore been concerned with showing that when the Act of 1862 as amended by the 1865 Supplement, was passed by Congress, there was conferred upon the Bridge Company a property right in and to its property as placed under the invitation of the United States which could only be taken in the exercise of its sovereign power under the limitation of the Fifth Amendment. We now come to the question of whether the order of the Secretary of War, compliance with which will destroy property of the Bridge Company and cause it to expend in excess of $400,000, is a **taking** within the purview of the Fifth Amendment.

In **Boyd v. United States**, 116 U. S., at page 635, Mr. Justice Bradley, with reference to a State Act which was claimed to be in contravention of the Fourth and Fifth Amendments, said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. **This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.**"

The history of our Constitution demonstrates that this method of construing the clause that "Private property shall not be taken for public use without just compensation" must be the proper and just one to adopt.

Story says this clause is

> "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity and is laid down by jurists as a principle of universal law."

He further says:

> "Indeed, in a free government, almost all other rights would become utterly worthless if the Government possessed an uncontrollable power over the private fortune of every citizen."

If the private property rights of the individual can be frittered away by denying the application of this section on a technical and narrow construction of the word "**taking**" when the property of the citizen is **destroyed** for public use, the guarantee of the bill of rights is vain and illusory. The title to the property does not have to

be actually transferred to the Government to require the property to be taken. To so hold would limit the amendment to merely a guarantee of the price to be paid at an agreed sale. The limitation imposed is imposed "on" the Government; the guarantee is "to" the citizen. There is no suggestion that the private property "taken" must go "to" the United States; the inhibition is against the United States taking it "from" the citizen. The object, then, being to protect the citizen in his "possession" of private property, it can make no difference to him whether the public use requires an actual transfer of the property to the government, or simply requires the destruction there.

Cases (*such as Monongahela Navigation Co. v. U. S., 148 U. S. 312*), can be found where in *obiter* the difference between a "destruction" and "taking," if any, has been suggested, or where (*as in the Union Bridge Co. case, 204 U. S. 364*), for reasons which we will presently show, there was held to be "no taking," or where (*as in Gibson v. U. S., 166 U. S. 269*), "incidental damage" was held to be no taking, but diligent search has failed to show us any case where the *ratio decidendi* of this court denied the citizen recovery under the Fifth Amendment when the public use "destroyed" his property, as distinguished from transferring it to the United States.

One of the most frequently cited cases where the exact contrary was held is **Pumpelly v. Green Bay Co.**, 13 Wallace, 166. That case arose in Wisconsin, whose constitutional provision read as follows:

"The property of no person shall be taken for public use without just compensation."

In the improvement of Fox River, under legislative sanction, a dam necessary to the improvement of the river caused lands adjacent to Lake Winnebago to be overflowed, and thus practically destroyed. The lands were not actually occupied or used in the improvement of the river. In upholding the claim for compensation, Mr. Justice Miller said (*p. 177*):

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, **it can destroy its value** entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors."

In **United States v. Lynah**, 188 U. S. 445, the question was directly presented to this court. Under congressional direction, the navigation of the Savannah River

was being improved. Certain dams were constructed during the progress of the work, which caused the destruction for commercial purposes of certain rice lands adjacent to the river banks. By reason of the increased height of the water, the percolation and seepage through the artificial banks raised the water on the lands to a depth of about eighteen inches and prevented any further cultivation of them. It was contended that this did not amount to a "taking" of the land.

This court said (*p. 468*):

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the Government, and if either of these be an essential element in the taking of lands within the scope of the Fifth Amendment, there was no taking."

After quoting the above citation from the Pumpelly case, Mr. Justice Brewer continues:

> "Reference was also made to the case of Sinnicksen v. Johnson, 2 Harr (*17 N. J. Law*) 129, in respect to which it was said: 'The case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.' Again on page 179 it was said: 'But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on Water Courses, equivalent to the taking of it, and that under the constitutional provisions, it is not necessary that the land should be absolutely taken.' " (*Citing many authorities.*)

He continues (*p. 470*):

> "It is clear from these authorities that where the government by the construction of a dam or other public work so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; **when that is done, it is of little consequence in whom the fee may be vested.**"

It will be noticed that both of these cases concerned the exercise of the power to improve navigation, the direct power under which the claim of "uncompensated obedience" is here asserted by the government. In neither case was there a suggestion that such a rule prevailed after the determination that there was a "taking" of private property.

The same rule of construction was announced by Mr. Justice Holmes in **Missouri Pacific Railroad Co. v. Nebraska,** 217 U. S. 205. The State of Nebraska passed a law requiring railroads to run switches from its lines into commercial plants located along its right of way. A plant requested a switch of the railroad and the railroad refused to lay the switch, and the legality of the Act was raised in a criminal proceeding brought under the Act. In holding the Act unconstitutional, Mr. Justice Holmes said:

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases the initial cost is said to be $450 in one, and $1,732 in the other,

> and to require the company to incur this expense **unquestionably** does **take** its property whatever may be the speculations as to the ultimate return for the outlay."

Here there was no conversion attempted. The State did not attempt to change title to the switch to either the State or the plant, but as compliance with the Act did require a "destruction" or "loss" of possession on the part of the citizen, it was held a taking within the purview of the Fifth Amendment.

In **United States v. Welsh**, 217 U. S. 333, where the building of a dam in the Kentucky River permanently flooded land adjacent to what is known as Four Mile Creek, the Government paid for the land, but refused to pay for a right of way adjacent thereto, which was destroyed. Mr. Justice Holmes said:

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits it must pay. But if it were **only destroyed** and **ended**, a "**destruction**" for public purposes may as well be a taking as would be an **appropriation** for the same end."

In **Peabody v. United States**, 231 U. S. 531, the ruling of the Pumpelly and Lynah cases is assumed to be the correct interpretation of the word "taking." While recovery was denied on other grounds, no doubt is intimated on the point under consideration. The pertinent facts in that case were that Congress had established a land battery of twelve guns which, to be available as a defense to Portsmouth, would have to fire the projectile

over land not appropriated by the Government, lying between the battery and the sea. The proof showed, however, that the guns were not intended to be fired in that direction except in actual defense of the realm. The opinion, in speaking of what amounted to a taking, said:

> "It may be assumed that if the Government had installed its battery not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a taking within the principle of the decisions. (*Pumpelly* v. *Green Bay Co., 13 Wall. 166; U. S. v. Lynah, 188 U. S. 445; U. S. v. Welsh, 217 U. S. 333.*)"

While no direct decision of this court is against the position taken above, certain cases cited below by the Government may be noticed and broadly distinguished.

In the Monongahela Navigation Co. case, 148 U. S., at page 337, it is said:

> "It should be noticed that here there is unquestionably a taking of the property and not a mere destruction. It is not a case in which the Government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire."

This mere suggestion, where the question is, in terms declared not to be involved, certainly can hardly be

considered as really casting a doubt on the position we take. While, as stated by the court, there was an actual conversion in that case, we can not believe the decision would have been different had the Government required the removal of the dams instead of directly taking them over under eminent domain power. It will be remembered that the facts there were that under an implied invitation of Congress and the express permission of Pennsylvania, the Navigation Company had placed its locks and dams in the Monongahela River. In taking over these under the power of eminent domain, this court held the "franchise to take tolls" was property that the Government must pay for. If we assume a "destruction" not to be a taking, it must follow that all that Congress has to do in future cases to practically nullify the above decision of this court is to order the removal of all privately owned dams, no matter upon the faith of what kind of grant they were built, and then later replace the dams without the necessity of paying for the franchise of which the company would be deprived. Or, Congress could build a lock and dam immediately below or immediately above the privately owned dam and then order the removal of the former one as an unreasonable obstruction to navigation. That such an evasion of a constitutional limitation on the Government could be successfully carried out is unthinkable.

CASES IN WHICH THE STRUCTURE WAS BUILT UNDER ACTS RESERVING TO CONGRESS THE RIGHT TO ALTER OR AMEND OR WHERE THE STRUCTURE WAS ERECTED WITHOUT AUTHORITY OF CONGRESS ARE NOT IN POINT.

In the opinion of the District Court is the following quotation from the **Hannibal Bridge case**, 221 U. S. 194, 205:

> "It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the chief of engineer recommended and as the Secretary of War required to be made after notice and hearing the parties interested, **was not a taking** of the property of the owners of such bridges within the meaning of the Constitution. Union Bridge Co. v. U. S., 204 U. S. 364; Monongahela Bridge Co. v. U. S., 216 U. S. 177; Field v. Clark, 143 U. S. 649; Buttfield v. Stranahan, 192 U. S. 470;"

and the "lesson" the District Court "takes" from this and the case of Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 408, is that notwithstanding all rulings the other way, when this court considers the case at bar, it will apply the same rule of "uncompensated obedience" to cases where no reservation of the power to alter or amend was contained in the grant as was applied in the cases referred to.

Every case cited above is founded on the reasoning in the decision of this court in **Bridge Co. v. United States**, 105 U. S. 470. A careful consideration of that case, then, is important.

BRIDGES BUILT UNDER CONGRESSIONAL ACTS WHICH CONTAINED A RESERVED RIGHT TO AMEND OR REPEAL.

The Newport & Cincinnati Bridge Company built a bridge across the Ohio River at Cincinnati under acts of Ohio and Kentucky, and under an Act of Congress approved March 3, 1869. The Congressional Act contained the following clause:

> "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

Before the completion of the Cincinnati bridge, Congress passed another Act in 1871 directing certain changes in the plans of the bridge at Cincinnati authorized by the Act of March 3, 1869. These changes were made by the company, and suit brought against the United States for the cost of the changes. The decision of the majority of this court denied relief to the company on the sole ground that the Act in terms reserved the power to withdraw the assent given under which the bridge was erected.

Chief Justice Waite begins the opinion, concurred in by the majority of the court, by reference to the reserved power in the Resolution of March 3, 1869, of withdrawing the assent of Congress to the right to continue the bridge then authorized. He then traces the history of

congressional enactments, and shows that Congress had only recently begun to reserve power to alter or amend grants given for the building of bridges across navigable streams, although as early as 1805, the same general reservation in favor of the President was contained in an Act allowing a bridge in the navy yard at Brooklyn, New York, and in favor of the Secretary of War in an Act passed in 1855 allowing a bridge to connect with the navy yard at Kittery, Maine. In tracing this legislation, he says with reference to the Louisville bridge:

> "The next was an Act of February 17, 1865, by which the Act of July 14, 1862, was amended so as to authorize the erection of a bridge across the Ohio at Louisville. **In this, too, there was no reservation of power,** but specific directions were given as to the height of the bridge, the number and locations of draws and the length of spans and it was expressly provided that all should be so constructed as not to interrupt navigation."

Then speaking of the exercise of the power reserved, in terms, in the 1869 Act and in the 1805 and 1855 Acts, he says:

> "It surely could not be claimed that if under the power reserved in these cases, the President had revoked the permission given in respect to the bridge at the Brooklyn yard or the Secretary had discontinued that at Kittery, the United States would be either legally or morally bound to make good the loss sustained by the companies or either of them on that account, and **the reason is that the language in which the power reserved was expressed clearly implied that all the risks of revocation and discontinuance were to be assumed by those to whom the**

> **grants thus limited were made.** So here in assenting to an untried experiment and one which might prove to be materially detrimental to the navigation of an important stream, Congress thought proper to reserve the right to withdraw its assent—revoke its permission—if what might possibly happen should, in fact, come as the consequence of the new authority which was granted."

Here, then, the right or franchise given was not absolute, but defeasible, at the option of Congress at any time.

Speaking of the application of the Fifth Amendment, the Chief Justice continued:

> "It is next insisted that if in the judgment of Congress, the public good required the bridge to be removed or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one can not be deprived of his property without due process of law, and that private property can not be taken for public use without just compensation. In the present case, the Bridge Company asked of Congress permission to erect its bridge. In response to this request, permission was given, but only **on condition that it might be revoked at any time** if the bridge was found to be detrimental to navigation. **This condition** was an **essential element of the grant**, and the company, in accepting the privileges conferred by the grant, **assumed all risks of loss** arising from any exercise of the power which Congress saw fit to reserve."

The court simply holds that where there is a reservation in the grant, if exercise of the reserved power **incidentally destroys** the property, it is not protected because that was a risk the owners assumed in accepting the

grant. That this is the proper construction of the Bridge Company case is no longer an open question, for in **Monongahela Navigation Co. v. United States,** 148 U. S., at page 340, after reciting the facts of the 105 U. S. decision, the court said:

> "It is evident, therefore, that the point decided was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation and with the knowledge that Congress might at any time declare that the bridge constructed as proposed was an obstruction to navigation; and that Congress, exercising this reserved power, did not thereby subject the Government to any liability for damages. There was no taking of private property for public uses; and while the company may have been deprived of property, it was deprived by due process of law because deprived under authority of an express reservation of power. Even this conclusion was reached with strong dissents. Mr. Justice Miller, Mr. Justice Field and Mr. Justice Bradley dissenting, and each writing a separate opinion, and **those opinions only make more clear the fact that the case was rested in the judgment of the majority on the effect of the reservation.**"

Hannibal Bridge Co. v. United States, 221 U. S. 194, involved a bridge built under an Act of Congress approved July 25, 1866, which contained this express provision:

> "The right to alter or amend this Act so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges is hereby expressly reserved."

The statement in the opinion that there was no "taking" of property by Congress in the exercise of this reserved power, can not, therefore, be construed as either a decision that the "destruction" of property is not a "taking" where the property is acquired under an irrevocable grant, or that where "no right is reserved" the order of the Secretary of War or Congress, itself, directing a removal would not be a "taking" within the meaning of the Fifth Amendment.

BRIDGES BUILT UNDER STATE AUTHORITY ALONE.

Referring to **Bridge Co. v. United States**, 105 U. S., we find at page 475, the following:

> "The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States." (*Citing cases.*)

Again:

> "But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that the States may do. When, therefore, Congress, in a proper way, declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. **Those who act on State authority alone necessarily assume all the risk of legitimate congressional interference.**"

This is the real ground of decision in **Union Bridge Co. v. United States**, 204 U. S. 364, and **Monongahela Bridge Co. v. United States**, 216 U. S. 177, and kindred cases. In both cases, the bridges were built **without any sanction of Congress**, and in the first case, the bridge was subject to complaint, in the language of the court, "practically ever since its completion."

In holding that in the exercise of its power to regulate commerce, Congress was not hampered by State grants, Mr. Justice Harlan in the Union Bridge case, at page 399, said:

> "Do the principles announced in the above cases require us to hold **in the present case** that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the Bridge Company for public use? We think not. Unless there be a taking within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue to the Bridge Company as the result of compliance with the Secretary's order, must, in such case be deemed incidental to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstructions. **There are no circumstances connected with the original construction of the bridge or with its maintenance since, which so tie the hands of the Government that it can not exert its full power to protect the freedom of navigation against obstructions.**"

What can this latter language mean but that as Congress had never given any permission to the builders to construct the bridge, when they did so under State authority alone, they "assumed the risk of congressional interference," but that when Congress had granted a right to construct without a reservation of power to withdraw its assent thereafter, it was estopped to do so? What "circumstances" connected with the original grant that would "tie" the hands of Congress, could there be more efficacious than an unconditional grant that had already been held by this court to be an irrevocable contract? The questions answer themselves in the light of the reasoning in the decisions above quoted.

Both the Union Bridge Company and the Monongahela Bridge Company built under State authority alone; hence can not claim that their properties were "lawful structures" within the meaning of the law.

There is no holding that because the property is "destroyed" it is not within the protection of the Fifth Amendment; the decision justifying removal is reached because the property has no legal status where it was placed. The only possible distinction made either in the Hannibal Bridge case or the Union Bridge case between the effect of a "taking" and a "destruction," is that while the latter is an effect which must be anticipated where property is placed under Congressional Act containing reserved power, or under State authority alone, even in such case, if Congress chooses to "take" the property instead of "to order its removal," the appropriation will cause the Fifth Amendment to apply.

The cases of Field v. Clark, 143 U. S. 649, and Buttfield v. Stranahan, 192 U. S. 470, cited in this connection by the District Court concern the delegation of power to the Secretary, and are not important to be considered here.

THE DECISION IN THE MOTTLEY CASE.

The case of **Louisville & Nashville R. R. Co. v. Mottley,** 219 U. S. 467, which seems to have had such overwhelming influence on the District Court, and to have induced the misconception that this court has held that the

> "right to regulate commerce and adjust legislation for that purpose to new exigencies and conditions as they arise * * * exists almost without limitations"

was a case essentially alike in principle to the Union Bridge Company case.

Mottley and wife were injured in a railroad collision, and in settlement of their claim for damages, the Railroad Company, in September, 1871, agreed

> "to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them."

There was no congressional legislation affecting the right of a railroad to issue passes in force at this time.

By an Act to regulate commerce of 1887, as amended by an Act of 1906, it was declared unlawful for railroads

> "to demand, collect or receive a greater or less or different compensation for the transportation of persons or property or for any service in connection therewith than the rate, fares and charges specified in the tariff filed and in effect at the time" (*page 475, opinion*).

After the passage of this Act, the Railroad Company refused to issue passes to the Mottleys and the legality of this position was the question before this court.

It will be noticed that the Congress was an entire stranger to the Mottley contract, and that it was made, like any other contract, **between individuals** subject to future changes in the law. It is a general principle of contract between individuals, almost as old as the law, that performance by one may become impossible by reason of future illegality. In such cases, there is neither a "destruction" nor "taking" of property, nor a taking for "public use."

The reasons in the summing-up of Mr. Justice Harlan seem clearly to dispose of the case as having any bearing whatever on the question at issue here.

> "We forbear any further citation of authority. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the Commerce Act, it can not now be enforced against the Railroad Company, even though valid when made. If that principle be not sound, the result would be that **individuals** and **corporations** could, by **contracts between themselves**, in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution, of its power to regulate commerce."

INCIDENTAL DAMAGE CASES DISTINGUISHED.

The Government relies upon cases like **Gibson v. United States**, 166 U. S. 269; **Scranton v. Wheeler**, 179 U. S. 141, and **Greenleaf Lumber Co. v. Garrison**, 237 U. S. 251.

In the first two of these cases, damages were claimed because access to the navigable part of a stream of certain riparian owners was cut off by the improvement of the stream for general navigation. It was held that there was only consequential injury, and not a taking because the riparian owner was not the "dominant owner" of the water rights, but that

> "riparian ownership is subject to the obligation to suffer the consequence of the improvement of navigation in the exercise of the dominant right of the Government in that regard."
>
> **Scranton v. Wheeler**, page 157.

Again, quoting from the Gibson case, in the Scranton v. Wheeler opinion, Mr. Justice Harlan said (*p. 157*):

> "Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, **or a direct invasion thereof**, but the incidental consequence of the lawful and proper exercise of a governmental power."

The distinction between those cases and the one at bar is shown in the case of **United States v. Lynah** (*supra*), and in the late case of **United States v. Welsh**, 217 U. S., where, at page 339, Mr. Justice Holmes said:

"The argument is only confused by reference to Gibson v. United States, 166 U. S. 269; cases like Harvard College v. Sterns, 15 Gray, 1; Smith v. Boston, 7 Cush. 354, etc., where it was held, although there are decisions the other way, that a landowner can not recover for the obstruction of a public water course, the discontinuance of a public way or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private rights, and that his damage, though greater in degree than the rest of the public, is the same in kind."

The **Greenleaf Lumber Company v. Garrison**, 237 U. S. 251, case was an injunction suit against the Secretary of War to prevent him from re-establishing harbor lines along the water front of the southern branch of Elizabeth River in Virginia.

The opinion of the court largely follows the reasoning of the Gibson case, and merely holds that the riparian owner acquires no vested right by building to a line established by the Secretary of War. The establishment of harbor lines is merely a declaration by the Secretary that any structure beyond that line will, as long as that line continues in effect, be an unreasonable obstruction to navigation. It is in no sense a contract upon the part of the Government that property erected **in the stream or waterway** is thenceforth lawful, or that changed conditions may not require a readjustment of the line. It is essentially a "prohibition" and not a grant. It is simply a *pro tanto* exercise of the power to prohibit obstructions, and leaves each riparian owner just where he was before as to that part of the stream not involved in the prohibi-

tion. Consequently, the damage suffered by any one assuming the risk is consequential and not direct, and, therefore, no property is taken within the meaning of the Fifth Amendment.

THE ACT OF 1899 DOES NOT APPLY TO BRIDGES BUILT UNDER THE ACTS OF 1862 AND 1865.

We have endeavored to show that the exercise of the power claimed under Section 18 of the Act of 1899, if that Act is construed to apply to appellant's bridge, would be a taking of its property without just compensation in violation of the Fifth Amendment. But such a construction is neither necessary nor justifiable.

In **Washington v. Miller**, 235 U. S. 422, speaking of the proper construction of an Act of Congress with reference to a preceding Act, Mr. Justice Van DeVanter, at page 428 says:

> "Where there are two statutes upon the same subject, the earlier being **special** and the later **general**, the presumption is **in the absence of an express repeal**, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. Townsend v. Little, 109 U. S. 504; *Ex parte* Crow Dog, *Id.* 556-570; Rogers v. United States, 185 U. S. 83, 87, 89."

In referring to repeals by implication, he says (*p. 428*):

> "Such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both. United States v.

Healy, 160 U. S. 136, 146; United States v. Greathouse, 166 U. S. 601, 605."

In **McChord v. Louisville & Nashville R. R.**, 183 U. S. 483, considering appeals by implication, Chief Justice Fuller, quoting from a previous decision, said:

> "Was the provision repealed by necessary implication? We say by necessary implication, for it is not sufficient to establish that subsequent laws **cover some** or **even all** of the cases provided for by it (*the prior law*); for they may be merely affirmative or cumulative or auxiliary."

In the case of **Southwestern Coal Co. v. McBride**, 185 U. S. 499, the construction of an Act of Congress affecting royalties due the Coal Company under a previous Act of Congress was under consideration. Section 16 of the Act then in question provided:

> "That it shall be unlawful for any person, after the passage of this Act, except as hereinafter provided, to claim, demand, or receive for his own use or for the use of any one else any royalty on oil, coal, asphalt, or other mineral or on any timber or lumber or any other kind of property whatsoever (*or*) any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid under such rules and regulations as may be prescribed by the Secretary of the Interior into the Treasury of the United States to the credit of the tribe to which they belong."

There was no exception in the Act of royalties theretofore **earned**, but payable **after** the passage of the Act,

and its language was sufficiently comprehensive to embrace such royalties. In holding that the Act did not apply to such royalties, Mr. Justice White said:

> "The function of the Legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed or necessarily implied from what is expressed; and assuming the Legislature to possess the power, its act will **not be construed to impair or destroy a vested right** under a valid contract unless it is so framed as to preclude any other interpretation."

Under the rule laid down in the **Wheeling Bridge** case, 18 How. 421, Congress knew when it declared the Ohio Falls bridge to be a "lawful structure" that its conclusion determined the legal status of the bridge no matter what the fact might be.

> "So far as the public use of the stream is concerned, the Legislature having the power to control and regulate it, the statute authorizing the structure, **though it may be a real impediment** to the navigation makes it lawful." (*Opinion, page 432.*)

The bridge had theretofore, in the first case (*13 How. 518*) been decreed as a **matter of fact** to be an obstruction to navigation.

The situation, then, in the case at bar, is that Congress, by its 1862 Act as supplemented by the 1865 Act, made a legislative finding that the bridge as built was not an "unreasonable" or "unlawful" obstruction to navigation, but a "lawful" obstruction, if an obstruction at all.

Stipulation IV, Record, page 10, says:

> "Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present, and **has done for forty-six years past.**"

Stipulation V is as follows:

> "Since the construction of the bridge of the Louisville Bridge Company, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the United States.
>
> "Prior to the year 1880, the tolls of the Louisville & Portland canal at the falls of the Ohio were an onerous burden on river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.
>
> "In 1880 the United States acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.
>
> "The United States is now engaged in the work of widening the Louisville and Portland canal, which work, when completed, will probably cause a further increase in navigation through the canal, and further diminish navigation over the falls."

As matter of fact, therefore, the physical situation existing at the Ohio Falls bridge has, in no way, justified a reversal of the legislative decree. On the contrary, the bridge is really less of an obstruction to river commerce at the falls than it was when built.

Section 18 of the 1899 Act conferring on the Secretary of War authority to hear and determine whether a bridge is an unreasonable obstruction to navigation was sustained as constitutional in **Union Bridge Co. v. United States**, 204 U. S., because, as said at page 385:

> "* * * in no substantial just sense does it confer upon that officer as the head of an executive department, powers strictly legislative or judicial in their nature or which must be exclusively exercised by Congress or by the courts."

The whole opinion shows that the only function of the Secretary was to ascertain a "fact" and then the "will" of Congress applied the Act.

If, therefore, Section 18 of the 1899 Act is applicable to the Ohio Falls bridge, we have this anomalous situation:

In 1870 (*the date of completion*) the bridge is declared by Congress, in terms, to be a "lawful structure" and in the language of Mr. Justice Nelson in the Wheeling case (*18 How., at page 430*),

> "although it still may be an obstruction in fact, it is not so in the contemplation of law."

In 1914, although the physical situation is just the same and the bridge no "more an obstruction" to navigation than it was when built, the judgment of Congress on the "fact" found by it at the time of the passage of the Act, is reversed by the Secretary on exactly the same evidence. If his finding is sufficient to destroy the Ohio Falls bridge, it is not the ascertainment of a "fact"

which can legally be delegated to the Secretary, but is the reversal of the "legislative discretion" which is vested alone in Congress.

The Act of March 3, 1899, does not, in terms, repeal the Act of 1862 as supplemented by the Act of 1865, and under the rules of construction announced in the cases cited above, the court will not hold that the provisions of Section 18 apply to the Ohio Falls bridge, and thus destroy "vested right," unless it can not be given a construction consistent with the 1862 Act, being treated as an exception thereto. Is there an "irreconcilable conflict" or an "absolute incompatibility" between them?

This court has already differentiated "action" by the **Secretary of War** and by **Congress itself** with reference to this very section. In **United States v. Baltimore & Ohio Railroad**, 229 U. S., at page 253, speaking with reference to an indictment of the Baltimore & Ohio Railroad, after notice by the Secretary under Section 18 of the 1899 Act, for maintaining the Parkersburg bridge (*also built under the 1862 Act*) Chief Justice White said:

> "No statute has been passed expressly condemning the structure as an obstruction to navigation or ordering its removal or alteration."

In that case the Secretary of War had brought a former suit against the company to abate the bridge as a legal nuisance under general equitable principles before he had proceeded under Section 18. In differentiating such proceedings and direct action by Congress, the Chief Justice said:

"It is not contended that the institution of the equity cause was directed by Congress, and it manifestly was brought directly or indirectly through the procurement of the Secretary of War in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans."

Again:

"We are of opinion, therefore, that, as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment, and as decisive of the question, that, in the absence of changed conditions, the bridge in question was not subject to the Act of 1899. How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it. And, of course, we also express no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress."

Another significant fact to be considered in construing the application of the Act of 1899 to bridges built under the 1862 Act, is that prior to the passage of the 1899 Act, Attorney General Griggs had given the Government an opinion to the effect that Section 4 of the Act of 1890, which was then in force and (*so far as pertinent here*) almost identical with Section 18 of the 1899 Act, did not apply to bridges built under the Act of 1862. His opinion was with reference to the Bellaire-Benwood

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bridge, one of the four erected under the provisions of the 1862 Act. In sustaining his position, he says:

> "Section 4 of the river and harbor act of September 19, 1890 (*26 Stats. 453*), confers upon the Secretary of War authority, whenever he has good reason to believe that any bridge now constructed or which may be hereafter constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, to require the persons owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, or unobstructed, in accordance with such specifications of changes as the Secretary shall determine.
>
> "In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation. The Act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872 or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure."
>
> Opinions of Attorneys General, Vol. 22, p. 343.

Under these circumstances it would seem clear that Congress did not expect to have Section 18 of the 1899 Act applied to the Ohio Falls bridge or other bridges built under the 1862 Act, as it did not change the wording of the authority given the Secretary of War, notwithstanding that the chief law officer of the Government had given an opinion that, under the statute as written, it would not be construed to apply to those bridges. Nor does the wording of Section 18 necessarily cause it to be applied to the Ohio Falls bridge. The Act says:

"Any railroad or other bridge now constructed, or which may hereafter be constructed."

If, in order to give effect to the word "now" the Ohio Falls bridge would have to be included within the purview of the section, there might arise the "irreconcilable conflict" which would call for the Government's construction, but no such necessity arises. At the time of the passage of the 1899 Act, there were two classes of bridges to which the word "now" could properly apply without affecting "vested right" viz.:

1. Bridges theretofore built under State authority only, and
2. Bridges theretofore built under congressional authority with a power of amendment or repeal reserved;

so that full effect can be given every word of Section 18 without holding that it is a repeal by implication of the finding of Congress that the Ohio Falls bridge as built and maintained is a "lawful structure" and "post road" of the United States, and as such, has the protection of the Fifth Amendment.

OPINIONS AND DECISIONS ON THE IDENTICAL QUESTIONS HERE PRESENTED.

Four bridges were built under the terms of the Act of 1862, viz.:

1. The Steubenville bridge,
2. The Bellaire-Benwood bridge,
3. The Parkersburg bridge,
4. The Ohio Falls bridge,

and upon attempts to renew the superstructure of each of the first three bridges, the identical question here at issue came before the courts.

Four times the District Court, and once the Circuit Court of Appeals decided the question against the Government.

Two Attorneys General, Griggs and Moody, rendered opinions against the right of Congress to order changes in bridges built under the 1862 Act without making just compensation.

In the Parkersburg case, 229 U. S., as said by the Solicitor General in his motion "to advance" the question was "involved" and we think, in so far as action under Section 18 of the Act of March 3, 1899, is concerned, was decided.

Early in 1899, the Secretary of War requested the opinion of Attorney General Griggs upon the question here presented, with reference to the Bellaire bridge, which was built under the Act of 1862, in the following language:

"Inviting your attention to Sections 4 and 5 of the River and Harbor Act of September 19, 1890 (*26 Stat. L. 453*), and Section 3 of the River and Harbor Act of July 13, 1892 (*27 Stat. L. 110*), I have the honor to request your opinion on the following questions:

"First, Whether, having in view the authority under which said bridge was built, the Secretary of War has power under the law to prescribe how the bridge shall be constructed so as to render navigation through and under it reasonably free, easy and unobstructed.

"Second, Whether, in case the company does not intend to construct the new bridge, the Secretary of War has power to serve notice on the company to make such changes in the bridge, specifying the changes, as he shall determine to be required to render navigation through or under it reasonably free, easy and unobstructive, and take such further action prescribed in Section 4 of the said Act of September 19, 1890, as will render the companies liable to the penalties prescribed in Section 5 of the same Act."

We have heretofore called attention to the fact that Section 4 of the 1890 Act is in all respects similar (*as far as here pertinent*) to Section 18 of the 1899 Act. (*See this section in full in Appendix.*)

Denying to the Secretary the power suggested in the second question, Attorney General Griggs, in part, said:

"The Act contains specific directions as to how such bridge should be built (*Act 1862*), the height of the span, whether built as a draw-bridge or with unbroken and continuous spans. The bridge in question was constructed in accordance with the assent of Congress, as expressed in that Act, and in compliance with the terms and conditions thereof. In

this Act there was no reservation by Congress of the right to alter, amend, or repeal the Act, or of any power to compel a company constructing a bridge in accordance with the terms thereof to alter or modify the structure as the demands of navigation or the judgment of Congress might subsequently require."

(*Opinions of Attorneys General, Vol. 22, p. 343.*)

After referring to **Bridge Company v. United States,** 105 U. S. 470, he said:

"This decision was rested entirely upon the fact that the right to require such alterations and modifications was expressly reserved in the Act. It seems quite clear, in view of the principle of that decision and upon ordinary principles of justice, that in the absence of such a reservation, a subsequent requirement by Congress that the company should change or modify its plan, whereby additional cost and expense are imposed upon it, would be essentially a taking of private property for public use without just compensation, a thing which under the Constitution could not be done. As was said by Mr. Justice Field in his dissenting opinion in the case of Bridge Company v. United States (*supra*):

" 'There is a general principle of justice pervading our laws and the laws of all free governments which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money or labor or materials for the protection and preservation of his property shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individuals.' "

And after referring to Section 4 of the 1890 Act, he says:

"In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation. The Act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872 or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure."

Not content with this opinion, an injunction was sought by the Government against the Baltimore & Ohio Railroad to prevent the reconstruction of the Bellaire-Benwood bridge. The District Court dismissed the bill on March 27, 1900, in an unreported decision, referred to in 134 Fed. Rep. 969.

In 1902, Congress directed the Secretary of War to furnish a list of the Ohio River bridges which were impediments to navigation, and report the same to Congress, together with information as to whether necessary changes could be secured under existing law, and, if not, what legislation was necessary, and an estimate of the cost of modification in each case. By the same Act, the Attorney General was authorized and directed to furnish an opinion upon the above questions.

Section 18 of the Act of 1899 was then in force, and is fully considered by Attorney General Moody in his opinion dated July 15, 1904, which was transmitted to Congress by the Secretary of War with the other information called for, later in that year.

After classifying the bridges under two separate heads, those built under the 1862 Act containing no right

of amendment or repeal, and those built under acts containing a reserved power, he minutely analyzes the reasoning of this court in **Bridge Company v. United States**, 105 U. S. 470, and a number of other cases here cited, and reaches this conclusion:

> "From these authorities it is clear that no power to that end having been reserved, the owners of bridges across the Ohio River erected under the authority of the Act of July 14, 1862, including the Steubenville bridge referred to in its first two sections, can not be required to alter or modify them at their own expense without compensation. The authority granted by that Act can not be termed a 'permit' merely; nor is it, as in the Newport and Cincinnati bridge case, 'a franchise expressly made defeasible at will.' The language of the Act suggests permanency. Bridges erected under its authority are declared to be 'lawful structures' and to be 'recognized and known as post routes.' They were not made subject to the interests of navigation, but, on the contrary, those interests were subordinated to them, Section 5 providing that 'the officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this Act.' This provision was doubtless suggested by the case of the Wheeling bridge, which structure, though afterwards legalized by Congress, had been declared unlawful because it interfered with several large packets with high chimneys then navigating the Ohio. (*13 How. 518; 18 How. 421*). The subjection of navigation to a servitude of this kind was, as held in the second Wheeling bridge case, a matter within the discretion of Congress."

With reference to the Ohio Falls bridge, he says:

"The Ohio Falls bridge was built under the authority of the Act of July 14, 1862, and the Amendatory Act of February 17, 1865 (*13 Stat. 431*). The latter Act authorized certain named railroad companies to construct a bridge over the Ohio River at the head of the falls of the Ohio, subject to the provisions of the former Act, upon certain prescribed conditions as to its height, spans, draws, etc. It also provided 'that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River'; and finally declared that 'the bridge erected under the provisions of this Act shall be a lawful structure, and shall be recognized and known as a post route.'

"The Act of February 17, 1865, contained no reservation of power to alter, amend, or repeal; so that, with the exception of the proviso that 'the said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River,' the situation does not differ from that presented by the Act of July 14, 1862, of which it was amendatory.

"The meaning and effect of this proviso would seem to be clear. Like the provisions as to the dimensions of the bridge, it is one of the conditions upon which the bridge was authorized to be built and its character as a lawful structure depended. If not built of the required height, width of span, etc., the bridge would be an unlawful structure; and although all other requirements were complied with, if built so as to interrupt the navigation of the river, it would still be unlawful. But **when** constructed in accordance with the prescribed conditions, and so as not to interrupt the navigation of the river, the bridge became, *ipso facto*, as declared in the Act, a lawful structure. The question whether it was so constructed as not to interrupt the navigation of the river was necessarily to be determined by the

requirements of navigation at that time. It could not be made dependent upon the needs of future navigation, without practically annulling the declaration that 'the bridge **erected** under the provisions of this Act shall be a lawful structure."

"It follows, therefore, that if the Ohio Falls bridge complied with all the requirements of the acts of July 14, 1862, and February 17, 1865, and did not at the time of its erection interrupt the navigation of the river, the owners thereof can not be required to make such changes therein as the interests of navigation may now demand, at their own expense, without compensation."

With this opinion before it for ten years prior to the action of the Secretary in this case, and with the knowledge that the chief law officers of the United States had declared that the Secretary of War has no power to act with reference to the Ohio Falls bridge, Congress has in no way attempted "direct action" nor directed a proceeding of any kind against the Bridge Company.

The question again arose in **Baltimore & Ohio Railroad Co. v. Leidecker,** one of the United States engineers, in a proceeding before District Judge Jackson of West Virginia and Circuit Judge Goff, and again the franchise right of the company under the 1862 Act was sustained (*134 Fed. 973*).

Again, in 1905, the United States filed its bill in equity in the Circuit Court for the Northern District of West Virginia to prevent the Parkersburg Branch Railroad, operated by the Baltimore & Ohio Railroad, and its Receiver, John W. Davis (*now Solicitor General*) from renewing the superstructure of the Parkersburg

bridge on the existing piers and raising again the question of right acquired by the owners of the bridge which was built under the Act of 1862. Judge Jackson also heard this case, and again reached the conclusion that bridges built under the 1862 Act were under the protection of the Fifth Amendment (*134 Fed. 969*). His judgment dismissing the bill was affirmed by the Circuit Court of Appeals for the Fourth Circuit in an opinion by Judge Pritchard, 143 Fed. 224.

In the opinion it is said:

> "The superstructure of this bridge which was made lawful by the Act of 1862, and approved by the government engineers as being a 'lawful structure,' in the course of time became worn-out to such an extent as to render its renewal necessary in order to insure the safety of passengers and the transportation of commerce. From the time of the erection of the bridge under the Act of 1862 until the filing of the bill in this case, there was no objection made as to the manner of its construction. It is therefore necessary that we should determine whether the acts complained of are such as to justify the contention that the appellees are constructing a new bridge. The piers as originally constructed remain intact and occupy the same relative position as when originally constructed in conformity with the Act of Congress and approved by the government engineers as a 'lawful structure,' and the only change that has been made is the renewal of the superstructure, the erection of which affords every facility for navigation which was enjoyed when the original superstructure was placed on the piers. If the building of the superstructure can be held to be the erection of a new bridge, then the removal of cross-ties and the substitution of new rails could also be held to be prohibited by the Act of 1899."

Again:

"The acts of Congress passed subsequent to the erection of this bridge can not be construed to relate to, or to in anywise affect, the manner of its construction, and were evidently intended to apply to bridges that might be erected subsequent to the adoption of same. There is no provision to be found in any of these acts which undertakes to regulate the building or repairing of bridges that may have been built and legalized under the Act of 1862. The Act of 1862 contains no reservation of any right of the Government to amend or modify or repeal the same. Under it the owners of the bridge were vested with a permanent franchise the moment they complied with its terms, and it is therefore property of which they can not be divested without due process of law and just compensation.

"In view of the fact that the appellees constructed the bridge under the Act of July 14, 1862, in strict accordance with its terms, we do not think that Congress has the power to direct such changes to be made as may be deemed necessary to the interest of navigation without providing compensation for the same. Here we have an Act which grants an unconditional license, in pursuance of which the owners of the bridge have invested their money and thereby acquired certain rights and franchises.

"It is contended by counsel for appellant that the right granted the owners of the bridge by the Act of July 14, 1862, is simply a license which may be revoked at any time, and in support of this contention the case of Newport & Cincinnati R. R. Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143, is cited. That case is not analogous to the one now before the court. The resolution which gave the assent of Congress to the erection of the Newport & Cincinnati bridge (*March 3, 1869*) reserved the right to alter or modify the bridge at any time so as to prevent obstructions to the river."

The whole case is thus summed up:

> "In view of these authorities we are of opinion: First, that the allegations contained in the bill to the effect that the bridge in question is a new structure are not sustained by the evidence, and therefore an injunction will not lie to restrain the railroad company or to abate the bridge as a nuisance; second, that the bridge having been built in conformity with the Act of July 14, 1862, which contained no reservation as to repeal, modification, or alteration, the only means by which the structure as now constituted can be removed, and a new bridge constructed in lieu thereof, in accordance with the Act of March 3, 1899, would be by Act of Congress authorizing the same and providing for just compensation."

The opinion above also refers to an opinion of the Sixth Circuit by Judge Severens sitting with Judges Lurton and Richards in the case of **United States v. Cincinnati & Muskingum Valley Railroad Co.**, 134 Fed. 353, where the United States sought to enjoin the railroad from renewing the superstructure of its bridge over the Muskingum River near Dresden, Ohio. The injunction was denied after a full discussion of the proposition that the right to build included the right to maintain, because—

> "the renewal of the superstructure in the circumstances existing was within the privilege of the company under its grant from the State and that the Act of Congress of August 5, 1886, 24 Stat. L. 324, c. 929, did not contemplate the application of its provisions to the construction of new parts in place of old required for the maintenance of bridges already built under lawful authority."

The next decision in point of time was that of Judge Sater (*Southern District of Ohio*) in the case of **United States v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.** rendered February 18, 1911. That was a direct proceeding by indictment under Section 18 of the Act of 1899 by the Secretary of War on account of the failure of the company to reconstruct the Steubenville bridge as directed by the Secretary under the terms of Section 18 of the 1899 Act.

The defenses were identical to those made here. The case was tried on an agreed statement of facts, and the court rendered a full written opinion after exhaustive arguments fully disposing of the arguments advanced in favor of the Government.

That portion with reference to the so-called "uncompensated obedience" to "police power" theory is instructive:

> "The Government's counsel claim that while the Act of 1899 and the proceedings had thereunder are not an exercise of the police power, they are nevertheless essentially such. * * *
>
> "The power of regulating bridges that affect the navigation of navigable rivers of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States. Bridge Co. v. United States, 105 U. S. 470; State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421; Gillman v. Philadelphia, 3 Wall. 713. The power invoked by the Government to cause an alteration of defendant's bridge is not the police power, but the power to regulate commerce vested in Congress by Article 1, Section 8, of the Constitution. The Government's counsel contend that because the rule of uncompensated obedience to laws enacted in

> the exercise of the police power is not violative of property rights protected by the Federal Constitution, the Government is relieved from all obligation to compensate the defendant for the cost that may be incurred in making the demanded alterations in the bridge. Certain cases claimed to declare the rule (*are*) urged with great earnestness. In those cases the decisions of the State courts were simply reviewed by the Supreme Court of the United States upon the Federal question as to whether or not such States were constitutionally exercising the police power. In none of them is the right of the United States to exercise the police power, or its equivalent, asserted."

Among the cases reviewed by the District Judge coming under the above heading are New Orleans Gas Light Co. v. Drainage Comrs., 197 U. S. 453; Chicago, Burlington & Quincy R. R. Co. v. Drainage Comrs., 200 U. S. 561; Northern Pacific R'y Co. v. Duluth, 208 U. S. 583; St. Paul, Minneapolis & Manitoba R. R. Co. v. Minnesota, 214 U. S. 497; Cincinnati, Indianapolis & Western R. R. Co. v. Connellsville, 218 U. S. 336.

Broadly distinguishing those cases, the court continues:

> "An examination of the facts of those cases discloses that they are each broadly distinguishable from the case at bar. Such improvements, although constructed under legal authority, were either subject to reserved right to require alteration, or must be taken to have been constructed with knowledge on the part of all that the State, in the exercise of its police power * * * might exact uncompensated obedience to its demand for modification. But the Act of 1862 granted an unconditional license in pursuance of which the owners of the bridge invested

their money and thereby acquired certain permanent rights and a permanent franchise. The Government may take the bridge as an entirety, it may require its modification to any extent desired, but for such taking or modification, it must render just compensation."

He therefore holds that:

"The Act of 1899 must be construed as applicable only to such bridges as were constructed under some Act of Congress in which the right was expressly reserved to require changes or modifications in the structure."

The last decision directly affecting the questions presented was by this court in **United States v. Baltimore & Ohio R. R. Co.**, 229 U. S. 244, the Parkersburg bridge being the subject of the litigation. Following the adverse decision of the Circuit Court of Appeals in the injunction case, the Secretary of War abandoned further efforts in his equitable proceeding and gave the notice and had the hearing provided for in Section 18 of the 1899 Act. After this hearing he issued an order finding the bridge an unreasonable obstruction to navigation and directing certain changes.

The equity decree was affirmed February 6, 1906, and the finding of the Secretary of War under Section 18 of the Act of March 3, 1899, was not made until nine months later. (*See page 250, opinion.*)

It is important here to note that this **finding was made after the decree was rendered in the equity cause.** The company refused to obey this latter order and an indictment followed. There was a directed verdict in the court below and the cause came to this court for review.

While the decision was rested by the District Court on the doctrine of *res judicata,* and that decision was affirmed here, we submit that this court necessarily decided the questions raised here in order to come to the conclusion that the question was one of *res judicata.*

The first Wheeling Bridge case, 13 How. 518, was a suit in equity to compel the removal of the bridge as an unreasonable obstruction to navigation. The decision was that the bridge was an unlawful obstruction and the decree ordered the obstruction removed. After that decree Congress passed an Act declaring the structure (*which had been found by the court, as a matter of fact, to be an unreasonable obstruction*) to be a "lawful structure," and in the second Wheeling Bridge case, 18 How. 421, this court held Congress could so change the status of the bridge as to prevent the enforcement of the equity decree. At least, in so far as an "unlawful" structure is made "lawful," this is undoubtedly the law. We do not find that the doctrine of the Wheeling case has since been challenged. Suppose we admit, for argument, what the Government asserts here, viz., that Congress can by its decree, without compensation, make a "lawful" structure "unlawful," and apply that admission to the Parkersburg case. The assumed basis of the Government's claim must be that the 1862 Act is repealed by the action of the Secretary of War under Section 18 of the 1899 Act; that his action, being administrative, is merely the ascertainment of a fact which ascertainment *ipso facto* makes the Act apply to the appellant's bridge; and while, therefore, repeal of the 1862 Act took effect *eo instanti*

upon action by the Secretary, it was a legislative finding that what the Legislature had theretofore declared "lawful" was henceforth "legislatively" held to be unlawful. This must be so, because, as we have seen, (*1*) where Congress acts in the matter at all, it is not a question of what the true fact is, but a question of legislative discretion (*Wheeling Bridge Co. v. U. S., 18 How. 421*), and (*2*) because the delegation of power under Section 18, Act 1899, is not an unlawful delegation for the reason that the legislative discretion is not conferred upon the Secretary (*Union Bridge v. Unitel States, 204 U. S. at page 385*). Applying this to the Parkersburg case, if the power of the Secretary under Section 18, Act 1899, to affect bridges built under the 1862 authority was not **necessarily denied**, because **necessarily involved**, both in the decision of the lower court and here, there was, in reality, no application of the doctrine of *res judicata*. We say this because the finding of the Secretary was not made until after the equity cause was complete. So that if we accept the Government's theory that Congress can make "unlawful" that which is "lawful," as we have seen from the Wheeling cases, a decree in no sense helps the situation. Before the Baltimore & Ohio Railroad was indicted, Congress had changed the status upon which the court had adjudicated. When the indictment was tried, therefore, the first case, like the first Wheeling case, could not control the decision in the second. On the other hand, if our contention is correct that there was no repeal by Congress of the 1862 Act under the Secretary's action (*because his finding of fact was not legislative, or if so,*

was inapplicable to bridges built under the 1862 Act), then the *res judicata* doctrine was rightly applied and the decision is correct. On no other hypothesis can it be sustained.

The language of the Chief Justice clearly sustains the correctness of this analysis. After referring to the opinions of the two Attorneys General, he says:

> "Unlike the statute thereafter enacted, nowhere in the Act of 1862, by which the authority to build the bridge was conferred and under which it was built, was there an express reservation of a right to alter or amend the Act in any respect. So also it is not questioned that the bridge was constructed in exact conformity to the requirement of the statute and that it has been so maintained ever since. **No statute has been passed expressly condemning the structure as an obstruction to navigation or ordering its removal.** * * *
>
> "It is not contended that the institution of the equity cause was directed by Congress and it manifestly was brought directly or indirectly through the procurement of the Secretary of War in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans."

After saying that the applicability of the Act of 1899 was in question in the equity suit, the opinion continues:

> "We are of opinion, therefore, that as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment, and as decisive of the question that in the **absence of changed conditions the bridge in question was not subject to the Act of 1899.** How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862 with no reserva-

> tion of the right to alter or amend will operate to limit the **power of Congress to directly legislate on the subject** of the removal or alteration of the bridge is a question we are not here concerned with and therefore express no opinion upon it. And, of course, we also express **no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress.**" (*Page 254.*)

This finding that action by Secretary under Section 18 **is not action by Congress**, leaves the legislative decree of 1862 declaring the Ohio Falls bridge to be a "lawful structure" still in force, and hence not subject to removal by a decree of court. Likewise the stipulation which says that:

> "The renewal however of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present and **has done for forty-six years past,**"

brings the case directly within that portion of the opinion (*page 254*) which says that the equitable decree was not only decisive of the facts averred in the indictment, but also that—

> "in the absence of changed conditions, the bridge in question was not subject to the Act of 1899."

Not only, therefore, was the question "involved," as said by the Solicitor General in his motion, but necessarily decided, and should control the case at bar. If we are wrong in this conclusion, we submit that the other opinions and decisions cited by us are so consonant with true legal principles and other adjudications of this court as to call for a reversal of the decree below.

What has heretofore been said about the right to regulate bridges being derived from the "commerce clause," and not from an unknown power analogous to the police power, makes a critical analysis of the "police power" cases unnecessary. The irrevocable contract made between the company and the United States, which is protected by the Fifth Amendment, shows that the "uncompensated obedience" doctrine has no place in this case; nor is there any foundation in true legal theory for the claim made in the opinion of the District Court that "one" Congress must transmit unfettered all constitutional powers to a "succeeding" Congress. There is but a single Congress. True, it has different members and different sessions, but it, after all, is merely the legislative body of the United States. Every contract made by Congress *pro tanto* "fetters" action at a succeeding session and yet that has never been held to deny it the power to contract. The Fifth Amendment itself is a "fetter" upon the action of Congress, and yet its existence has never been held to deny the citizen the protection of the amendment. The rule we contend for will work no hardship upon the United States, because it can wholly destroy the Ohio Falls bridge in the regulation of commerce under its eminent domain power by merely placing the burden where it belongs, that is, upon the public, for whose use the loss is incurred. However, in this case that is really not necessary, because the enlarged canal at Louisville will make commerce over the falls so negligible that the Ohio Falls bridge will cease to be any obstruction whatever to navigation at that point.

We respectfully submit that the decree of the District Court should be reversed and the case remanded with directions to dismiss the bill.

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WILLIAM W. CRAWFORD,
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LAWRENCE MAXWELL,
Of Counsel.

APPENDIX.

AN ACT To Establish Certain Post Roads, Approved July 14, 1862.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the bridge partly constructed across the Ohio River at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a lawful structure: Provided, that when completed, if constructed without a draw, it shall leave an unobstructed headway in the channel of the river of not less than ninety feet above low-water mark, and such channel or waterway shall have an unobstructed width of not less than three hundred feet between the piers next to said channel or waterway, and one of the spans next adjoining thereto shall not be less than two hundred and twenty feet in length; or said bridge, if constructed with a draw, the same to be constructed under the limitations and conditions provided in the fourth section of this Act.

Sec. 2. And be it further enacted, That the said bridge and Holliday's Cove Railroad are hereby declared a public highway, and established a post road for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the Legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered

by the State of Virginia, or either of them, are authorized to complete, maintain and operate said road and bridge when completed as set forth in the preceding section, anything in any law or laws of the above-named States to the contrary, notwithstanding.

Sec. 3. And be it further enacted, That it shall be lawful for any other railroad company or companies, whose line or lines of road may now or shall hereafter be built to the Ohio River, above the mouth of the Big Sandy River, in acordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

Sec. 4. And be it further enacted, That any bridge erected under the privileges of this Act may, at the option of the company or companies building the same, be built either as a draw bridge, with a pivot or other form of draw, or with unbroken and continuous spans: Provided, that if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation than ninety feet above low-water mark over the channel of the said river, nor in any case less than forty feet above extreme high water as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge, covering the main channel of the river, be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall

be parallel with the current of the river as near as practicable: And provided, also, that if any bridge built under this Act shall be constructed as a draw bridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw: And provided, also, that said draw shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or trains are passing over said bridge, or when passenger trains are due, but in no case shall unnecessary delay occur in the opening of said draw after the passage of such engines or trains.

Sec. 5. And be it further enacted, That any bridge or bridges erected under the provisions of this Act shall be lawful structures, and shall be recognized and known as post routes upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies

erecting such bridge may from time to time receive on the balance of their line or lines for such services; and the officers and crews of all vessels, boats or rafts navigating the said Ohio River, are required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this Act.

U. S. Stats. at Large, Vol. 12, p. 569.

AN ACT Supplemental to an Act Approved July 14, 1862, Entitled "An Act to Establish Certain Post Roads." Approved February 17, 1865.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the Act of Congress approved July 14, eighteen hundred and sixty-two, entitled, "An Act to establish certain post roads," shall be and the same is hereby so amended as to authorize the Louisville and Nashville Railroad Company and the Jeffersonville Railroad Company (*stockholders in the Louisville Bridge Company*), to construct a railroad bridge over the Ohio River at the head of the falls of the Ohio, subject to all of the provisions of said Act: Provided, that the said bridge may be constructed at a height not less than fifty-six feet above low-water mark, and with three draws sufficient to pass the largest boats navigating the Ohio River—one over the Indiana chute, one over the middle chute, and one over the canal: Provided, that the spans

of said bridge shall not be less than two hundred and forty feet, except over the Indiana and middle chute and the canal. Said bridge shall be constructed with draws of one hundred and fifty feet wide on each side of the pivot pier over the Indiana and middle chute, and ninety feet wide over the canal: And provided, further, that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River.

Sec. 2. And be it further enacted, That the bridge erected under the provisions of this Act shall be a lawful structure, and shall be recognized and known as a post route.

U. S. Stats. at Large, Vol. 13, p. 431.